

* The original of this document contains information which is subject to withholding from disclosure under 5 U.S.C. 552. Such material has been deleted from this copy and replaced with XXXXXX's.

September 28, 2005

DEPARTMENT OF ENERGY
OFFICE OF HEARINGS AND APPEALS

Hearing Officer's Decision

Name of Case: Personnel Security Hearing

Date of Filing: April 6, 2005

Case Number: TSO-0221

This Decision concerns the eligibility of XXXXXXXXXXXXXXXX (hereinafter "the individual") to hold an access authorization.¹ The regulations governing the individual's eligibility are set forth at 10 C.F.R. Part 710, "Criteria and Procedures for Determining Eligibility for Access to Classified Matter or Special Nuclear Material." This Decision will consider whether, based on the testimony and other evidence presented in this proceeding, the individual should be granted access authorization. As discussed below, I find that access authorization should not be granted in this case.

I. BACKGROUND

This administrative review proceeding began with the issuance of a Notification Letter by a Department of Energy (DOE) Office, informing the individual that information in the possession of the DOE created substantial doubt pertaining to his eligibility for an access authorization in connection with his work. In accordance with 10 C.F.R. § 710.21, the Notification Letter included a statement of the derogatory information causing the security concern.

The Notification Letter indicated that in a June 2004 random drug screen, the individual tested positive for amphetamines/methamphetamines. This is a security concern under 10

1/ An access authorization (or security clearance) is an administrative determination that an individual is eligible for access to classified matter or special nuclear material. 10 C.F.R. § 710.5.

C.F.R. § 710.8(k)(Criterion K), which pertains to use of illegal substances. The Notification Letter further indicates that in May 2003, the individual signed a certification in which he promised to refrain from using or being involved with illegal drugs as long as he maintained a security clearance. Violation of this promise is a security concern under 10 C.F.R. § 710.8(l) (Criterion L), which relates to trustworthiness and reliability, or violation of any commitment or promise upon which DOE previously relied to favorably resolve an issue of access authorization eligibility.

The Notification Letter informed the individual that he was entitled to a hearing before a Hearing Officer, in order to respond to the information contained in that letter. The individual requested a hearing, and that request was forwarded by the DOE Office to the Office of Hearings and Appeals (OHA). I was appointed the Hearing Officer in this matter.

Prior to the hearing, the following evidence was presented. On June 16, 2004, the individual participated in a random drug screen conducted by his employer, a DOE contractor. That day was his last day on the job with this particular DOE contractor. The results of that screen were positive for amphetamines/methamphetamines. The very next day, June 17, the individual participated in a drug screen conducted by his new employer, another DOE contractor. The results of that screen indicated that "no evidence of substance abuse was found." Individual's Submission of July 6, 2005. ²

In accordance with 10 C.F.R. § 710.25(e) and (g), the hearing was then convened. At the hearing, the individual testified on his own behalf, and presented the testimony of his wife. The DOE Counsel presented the testimony of the operations manager/certifying scientist for the laboratory that performed a drug test for the individual.

II. Hearing Testimony and Documentary Evidence

A. Documentary Evidence

The individual presented some additional evidence regarding drug testing. Specifically, he submitted the results of several drug tests administered in 1999 and subsequent to the June 16 positive test. All results were negative for controlled substances. Individual's Submission of July 6, 2005; Individual's Hearing

^{2/} Both test results were issued on June 24, 2004.

Exhibit A. He also submitted a July 22, 2004 letter from his personal physician stating that "Entex" (pseudoephedrine) was prescribed for the individual about 18 months prior to the positive drug test, and that the individual "recently" used this medication for sinus problems. In the letter, the physician stated that this substance could "result in a false positive urine toxicology screen using the immunoassay technique. If there is any question then a gas chromatography/mass spectrometry technique should be employed . . . they tell me that false positives do not occur with that test." Individual's Hearing Exhibit B.

The DOE counsel submitted the underlying drug test information for the individual's June 16 and June 17 tests. DOE Hearing Exhibit (Tabs A through G). ³

B. Hearing Testimony

1. The Individual

The individual denies that he used amphetamines/methamphetamines illegally. He states that, in addition to the "Entex" mentioned by his physician, he was using the following medications at the time of the drug tests: Sudafed, Allegra and Vick's nasal spray for allergies; ranitidine, a heartburn medication; and cyclobenzaprine, a muscle relaxant.⁴ Tr. at 8-12. He contends that these medications could have produced the positive result on June 16. He also points to the drug test results that he has submitted, all showing negative results for illegal drugs. He maintains that these negative test results corroborate his assertion that he does not use illegal drugs. Tr. at 72-80.

2. The Individual's Wife

The individual's wife testified that the individual was formerly a user of illegal drugs, but she believed that about 12 years ago he firmly committed to giving up using illegal drugs. She suggested that the positive drug test might have been caused by a contaminated sample. Tr. at 58-63.

3/ Tab G was submitted via E-mail on July 14, 2005, prior to the hearing.

4/ Cyclobenzaprine is a generic form of "Flexeril." Ranitidine is a generic form of "Zantac." Tr. at 53.

3. The Certifying Scientist

The Certifying Scientist (CS) testified that she is employed by the laboratory that performed the individual's June 16 drug test. She stated that her role as CS is "making sure that all of the data that comes through into the certifying room from the analytical side is valid and correct, and meets all of our QC [quality control] and other requirements before it's released in the computer to the clients." Tr. at 25.

The CS gave a detailed description of the protocol for taking the sample and the ensuing chain of custody. Tr. at 27-32; 41-43. She testified that her review showed nothing irregular in the collection or chain of custody. Tr. at 43.

She then discussed the test results for the June 16 drug test. She indicated that the first test on a sample is performed by the immunoassay method. A result over 100 is considered positive in this phase. In this case, the individual's result was 105.6, which was therefore positive. Tr. at 33-34.

According to the CS, once there is a positive result in the immunoassay phase, the sample is immediately sent for confirmation screening using a gas chromatography/mass spectrometry (GC/MS) test method. This method separates amphetamines and methamphetamines, and establishes levels for each. The test result for the individual showed 238 nanograms per milliliter (ng/mL) for amphetamines and 783 ng/mL for methamphetamines. The cut-off for methamphetamines is 500 ng/mL. Therefore, the individual had a positive result for methamphetamines.⁵ Tr. at 39-40.

The CS testified that a "D & L" analysis was then performed to establish the type of methamphetamine that was present in the individual's sample. This analysis evaluates whether the form of the methamphetamine detected was the "L" form, which is found in the over the counter product Vick's inhaler, or the "D" form, which is available legally as a prescription drug, or illegally, in so-called "street drugs."⁶

5/ The cut-off for amphetamines is also 500. In this case the individual was below the cut-off for amphetamines. Tr. at 40.

6/ The "D" form produces a greater effect on the central nervous system than the "L" form.

In this case, the results of the D & L screen showed that the type of methamphetamine in the individual's system was almost entirely of the "D" type, and not the over the counter "L" type. The CS testified that the D & L analysis ruled out the possibility that the individual's positive drug test was caused by his use of the Vick's inhaler. She further testified that the other medications the individual referred to, Sudafed, Allegra, ranitidine, and cyclobenzaprine, are unrelated to amphetamines and methamphetamines. She stated that these drugs would either not contribute to a positive test result or would be screened out in the GC/MS or D & L tests. Tr. at 45, 52-53, 83. She further indicated a false positive due to the Entex would be eliminated in the GC/MS test. Tr. at 80.

The CS then discussed the individual's creatine level. This test shows the dilution level of the urine sample. The lower the number, the more dilute the sample. She pointed out that in the individual's June 16 drug test, his creatine level was 108.2 milligrams per deciliter. This level was in the normal range. Tr. at 35-36. The CS then noted that the creatine level in the individual's June 17 sample was 46.4. She stated that while this is still in the acceptable range, the creatine level was less than half of the level of the previous day's sample. Tr. at 48-49. The CS stated that the low creatine level could be induced by drinking large amounts of water. She further stated that "if you drink enough water to reduce your creatine level, you're also reducing the drug content that could be contained in your urine. So the day before, he had a combined amphetamine/methamphetamines value of around a thousand nanograms per ml, which enabled him to screen positive, but the next day with the creatine level of about half of that, you could expect that his drug level in his urine would also be about half of that. And as a result, he did not then screen positive for amphetamines on their immunoassay test [because the level fell below the thousand nanograms per milliliter cutoff]." ⁷ Tr. at 49.

7/ The CS indicated that from the test result itself, there was no way of ascertaining whether the individual consumed additional liquid for the purpose of circumventing accurate test results, or whether the amount he consumed was "abnormal." However, she stated that, in any case, the second urine sample was much more dilute than the first. Tr. at 53. The CS also stated that since the individual's test result was negative for June 17, the actual numeric values in the screen were not reported. Tr. at 51.

The CS further pointed out that the individual's combined amphetamines (238) /methamphetamines (783) values totaled 1021, and that this is just slightly above the 1000 ng/mL cut off for this screen. The CS also stated that "amphetamine does not stay in your system for all of that long of a period," and that the metabolic life is about two to four days. Tr. at 50. She testified that "if you're very close to the cutoff, and then you wait an entire 24 hours, then it's very likely you'll be below the cutoff. When you add the fact that he drank enough water to dilute creatine to about half of what it was the day before, then you're in a situation where you very likely won't screen positive, and in this case, he did not." Tr. at 50-51.

III. Applicable Standards

In these personnel security review cases, the burden is on the individual to come forward at the hearing with evidence to convince the DOE that granting or restoring his access authorization "would not endanger the common defense and security and would be clearly consistent with the national interest." 10 C.F.R. § 710.27(d). Therefore, once a security concern has been found to exist, the individual must provide evidence to rebut, refute, explain, extenuate or mitigate that concern. *Personnel Security Hearing* (VSO-0005), 24 DOE ¶ 82,753 (1995), *aff'd*, 25 DOE ¶ 83,013 (1995). See also 10 C.F.R. § 710.7(c). Thus, in a case where there is evidence of a positive drug test, an affected individual must provide convincing evidence mitigating the security concerns related to the illegal drug use. *Personnel Security Hearing* (VSO-0216), 27 DOE ¶ 82,781 (1998).

IV. Analysis

The issue in this case is whether the individual has mitigated the Criteria K and L concerns by demonstrating that the June 16 positive drug test was incorrect or by demonstrating some reason for a positive June 16 drug test which does not give rise to a security concern. The individual has raised the following responses to the charges in the Notification Letter. He maintains that the inconsistent results of the two tests suggest that the June 16 test must be erroneous. He contends that the medication that he was taking at the time could have produced the positive test. He suggests that there may have been some irregularity in the collection or handling of his sample.

A. Inconsistent Test Results

The CS testified clearly and persuasively that the inconsistent test results do not raise an alarm and can be explained by several factors. First, the individual's positive test level was just over the 1000 ng/mL cut off, and there was a period of about 24 hours between the two tests.⁸ She believed that this time period was sufficient to allow the amphetamine level to fall below the 1000 ng/mL cut off point on the immunoassay test. Second, the CS testified that the individual's creatine level was half that of the previous day, indicating that his urine sample for the second test was much more dilute than that for the first test. This also would have reduced the concentration of amphetamines/methamphetamines in the individual's urine sample and could produce a negative test result in the second immunoassay test. The individual has not brought forward any evidence to suggest that the testimony of the CS is incorrect. I am therefore convinced that the inconsistency between the June 16 and June 17 tests does not indicate any error in either test.

B. Individual's Medications

I am also persuaded by the testimony of the CS that the individual's use of Vick's nasal spray did not cause the positive test. I believe that the D & L screen that she described put that contention to rest. I am also persuaded that the "Entex" (pseudoephedrine), a prescription medication that the individual may have been using around the time of the test, also did not cause the positive reaction. Tr. at 79. Similarly, I find that neither Allegra, nor cyclobenzaprine, nor Sudafed caused the positive test result. Tr. at 52-53, 80, 88. The testimony of the CS convinces me that the individual's medications for heartburn did not cause the positive test. Tr. at 52-53. Thus, there is no evidence that any of the medications used by the individual at the time of the positive drug screen could have produced that result.⁹

8/ The individual's wife testified that the time period between the two tests was slightly less than 24 hours. Tr. at 63. I do not see any reason to believe that these few hours make any difference in this case.

9/ I invited the individual to consult with his personal physician to review whether he was using any other medication at the time that might have resulted in the positive screen, and to submit additional information on this issue prepared by his physician. Tr. at 65, 77, 91-92. The individual did not file anything further on this point.

C. Irregularity in Handling the Sample

The individual does not provide any reason or evidence to support the contention that an irregularity in the collection or handling of his sample produced a false positive. Quite the contrary, the evidence in this case strongly indicates that the collection of the individual's sample and the chain of custody were performed with care and attention to the appropriate protocols. Tr. at 27-32, 43. See also DOE Hearing Exhibit, Tabs B, D, and E.

In sum, the individual has not brought forth any evidence to support his contention (i) that the inconsistent June 16 and 17 drug tests suggest that the positive test was erroneous; (ii) that any of the medications he was taking could have produced the positive test; or (iii) that there was any irregularity in the handling of his sample. The individual's submission of several negative drug tests simply does not overcome the other evidence in this case. Accordingly, I find that the individual has not resolved the Criterion K concerns raised by the positive drug test. For these reasons, the Criterion L security concerns, related to the individual's promise to refrain from involvement with illegal drugs while holding a security clearance, have also not been resolved.

V. CONCLUSION

As the foregoing indicates, the individual has not resolved the Criteria K and L security concerns cited in the Notification Letter. It is therefore my decision that restoring this individual's access authorization is not appropriate at this time.

The parties may seek review of this Decision by an Appeal Panel under the regulation set forth at 10 C.F.R. § 710.28.

Virginia A. Lipton
Hearing Officer
Office of Hearings and Appeals

Date: September 28, 2005